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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

JAMES T. OMAN,
FRED R. WALKER,
WILLIE A. GIBBONS,
and
HUGH V. REYNOLDS,

Petitioners,

v.

H. K. PORTER COMPANY, INC.
RAYMARK INDUSTRIES, INC.,
and
PITTSBURGH-CORNING CORP.,

Respondents.

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED

I. Whether admiralty jurisdiction applies to tort actions for injuries allegedly (1) received in shipyards (2) by land-based insulation workers (3) from asbestos insulation products that (4) have no uniquely maritime character.

II. Whether the Court of Appeals can validly apply a correct ruling retroactively.

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ON PETITION FOR A WRIT OF CERTIORARI
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# BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

In deciding that admiralty jurisdiction did not apply to petitioners' cases, the Fourth Circuit Court of Appeals correctly applied this Court's prior rulings.

This Court should deny the petition of Oman and his adherents not only because the Fourth Circuit Court of Appeals correctly applied settled legal principles, but because it does not present "special and important reasons" for review as required by United States Supreme Court Rule 17.1.

## PETITIONERS HAVE FAILED TO ESTABLISH A BASIS FOR THIS COURT TO REVIEW ON CERTIORARI

A review on certiorari is not a matter of right but of judicial

discretion and will be granted only when there are special and important reasons therefor. In the case before the Court on petition for writ of certiorari, petitioners have not established a basis under any application of Rule 17 for this Court's review of the Fourth Circuit Court of Appeals' decision denying the extension of admiralty jurisdiction to personal injury suits brought by land-based insulation workers.

## ARGUMENT

### I. The Fourth Circuit's Admiralty Decision Brings Uniformity To The Circuit Courts Of Appeal On The Issue, Resolving Prior Conflict.

In 28 U.S.C. § 1254(1) it is stated that cases in the United States

Court of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after judgment.

Rule 17 of the Rules of the Supreme Court articulates the considerations governing the Court's review on writ of certiorari and states in part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict

> with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioners have not established any basis under Rule 17 for this Court's issuance of a writ. Under Rule 17.1(a), it is appropriate to review a decision of a federal court of appeals when that court of appeals

renders a decision in conflict with the decision of another federal court of appeals on the same matter.

The decision which gives rise to the petition before this Court is markedly different from the premise enunciated above. The Fourth Circuit's declination to extend admiralty jurisdiction to land-based shipyard insulation workers' claims for asbestosis actually brings it into agreement with the other circuits, thereby resolving and abrogating the last conflict among the circuits on this issue. See Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir. 1983), cert. dismissed, 104 S.Ct. 34 (1983); Keene Corporation v. United States, 700 F.2d 836 (2nd Cir. 1983), cert. denied, 104 S.Ct. 195 (1983);

Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984); Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984) and Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984).

The important judicial interests of uniformity and consistency in the application of federal law are better served by denying a petition for writ where the threshold requirements of Supreme Court Rule 17 have not been met.

## II. The Fourth Circuit Court Of Appeals' Admiralty Decision Is Consistent With This Court's Rulings In Executive Jet And Its Progeny.

United States Supreme Court Rule 17.1(c) provides for review on certio-

rari of cases where a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or where it decided a federal question which resulted in a conflict with the applicable decisions of the Supreme Court. Petitioners, similarly, have not established any basis for review on certiorari under Rule 17.1(c).

The central issue of federal law in this case is the application of admiralty jurisdiction and law to asbestos-related personal injury claims by land-based shipyard insulation workers. The Supreme Court's decisions in Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249 (1972) and its progeny establish

clear guidelines for the imposition of admiralty jurisdiction, which were applied and followed by the Fourth Circuit Court of Appeals.

The Fourth Circuit, in Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir. 1985), (the case now under appeal) adopted a four-part nexus test, comparable to that in Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974) as a guideline to analyze the nexus requirement established by the Supreme Court in Executive Jet. The Fourth Circuit corrected its flawed analysis in White v. Johns-Manville, 662 F.2d 234 (4th Cir. 1981), cert. denied, 454 U.S. 1163 (1982), by analyzing the nexus requirement with regard to: "(1) the functions and roles of the

parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and the type of injury; and (4) traditional concepts of the role of admiralty law." 764 F.2d at 224, 230, citing Myhran v. Johns-Manville Corp., 741 F.2d 1119, 1121 (9th Cir. 1984); Harville v. Johns-Manville Corp., 731 F.2d 775, 783 (11th Cir. 1984) and Owens-Illinois v. United States District Court, 698 F.2d 967, 970 (9th Cir. 1983). The Fourth Circuit's expanded approach abandoned its earlier and narrower focus on the place where the products were ultimately used, and instead utilized all four "nexus" factors in reaching its decision.

Petitioners assert the "nexus test" articulated by the Fourth

Circuit adds "still more complexity to the set of irreconcilable analyses offered up by the various courts of appeal." (Pet. Brief 4.) Yet, they fail to recognize that what they call differences are merely variations of the same prevailing theme, that is, claims by land-based insulators engaged in ship building and repair with exposure to air-borne asbestos fibers are not sufficiently linked to traditional maritime activity concepts to warrant the imposition of admiralty.

The "nexus" test of Executive Jet is the point of initiation for petitioners' argument that conflict exists. Petitioners agree that Executive Jet's nexus reference to traditional maritime activities is

premised on the concept that those activities require uniform treatment for the promotion of federal interests in shipping, or that those matters, due to their peculiar relation to navigation or commerce on navigable waters, are not adequately covered by local laws. Yet, they assert the various circuits have given no clear statement in that regard. Petitioners forget the same argument to the Oman court resulted in the Fourth Circuit's correct observation that petitioners' claim did not present a unique or peculiar situation requiring admiralty treatment. In so ruling the Fourth Circuit adopted the thread common in every circuit, that is, the claims of land-based asbestos insulators do not warrant admiralty's application.

Petitioners state their actions sound in admiralty because some of their exposures to asbestos-containing materials occurred while working on or around pipes and boilers which happened to be located aboard ship. Such an argument obscures the fact the wrong alleged, the failure to warn of hazards, is the same as that alleged with reference to exposures to asbestos-containing insulation materials at landside locations. This "wrong" fails to satisfy the "nexus" requirement for admiralty, as it has no peculiar relation to navigation or commerce, and it promotes no legitimate federal interest. Executive Jet underscores the flaw in petitioners' position in holding damages to an aircraft allegedly caused by a failure

to warn were attributable to a cause unrelated to the sea, so that the determination of liability had to be based on factual and conceptual inquiries unfamiliar to the law of admiralty.

In an attempt to come under the nexus umbrella, petitioners argue that effective heat insulation, but not necessarily asbestos, is essential to the navigation of a ship. This approach, taken alone, is insufficient to automatically convert all insulation-related cases into admiralty actions, just as it does not convert all fuel-related or furniture-related cases into admiralty actions, even though fuel and furnishings are required for the operation of ships.

Similarly, petitioners contend seamen occasionally repair pipecovering and that pipecovering, therefore, bears a significant relationship to traditional maritime activity. In and of itself this conclusion is improper, as is petitioners' claim that the Fourth Circuit "erred in assuming, incorrectly, that asbestos insulation work is not among the ordinary duties of a seaman." (Pet. Brief 13). It has been observed previously that:

> [N]ormal maintenance activities that are the responsibility of a ship's crew include some repair work. But a sensible and practical distinction can be and is drawn between repairs that can be and are likely to be made by seamen during the course of a voyage and repairs the nature and extent of which make them beyond the area of a seaman's normal responsibility....
> Thus, the coincidence that seamen's work and shipbuilders'

> work both may involve the mechanical lifting of heavy objects from the hold of a ship does not cause a shipbuilder to become functionally a seaman during that part of his structural work that involves such lifting...

Bryant v. National Transport Corp., 467 F.2d 139, 140-141 (3rd Cir. 1972), citing United New York and New Jersey Sandy Hook Pilots Ass'n. v. Halecki, 358 U.S. 613 (1959); Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952).

Petitioners rely upon the Fourth Circuit's 1981 ruling in Vaughan v. Johns-Manville Corp., 662 F.2d 251 (4th Cir. 1981) to claim admiralty extends to asbestos product insulation work. There it was held that admiralty jurisdiction extended to a claim by a sailor working as a boiler tender whose job included installing and

removing insulation while the ships were on the high seas. Reliance on Vaughan is inappropriate here since Vaughan was actually a sailor who carried out all his work at sea, and not a land-based insulation worker such as petitioners. In Oman, the Fourth Circuit correctly reasoned that asbestos insulation work for land based insulators is not a traditional maritime activity, since insulation work was the same wherever undertaken, whether on land or on ships.

The four part nexus test of Oman used to determine if the activity being reviewed related sufficiently to traditional maritime activity so as to invoke admiralty is consistent with and borrowed heavily from Executive Jet and Kelly. By so holding the

Fourth Circuit has at last joined its sister circuits in holding that petitioners' claims are insufficient for admiralty imposition. Respondents submit the federal question of admiralty, as it relates to these petitioners, was settled by this Court's decision in Executive Jet. It remained only for the circuits to rule in a manner consistent with Executive Jet. The Fourth Circuit, and all other circuits which have ruled to date are in consonance with the rules of Executive Jet. Therefore, under Rule 17.1(c) there is no basis for certiorari.

III. The Fourth Circuit's Decision To Apply The Ruling Retroactively Is The Right And Fair Result; The Mere Fact The Ruling Was Adverse To Petitioners' Interest Is No Basis For Review On Certiorari

In their second argument, petitioners claim the Fourth Circuit's retroactive application of the ruling is a clear departure from the Supreme Court's governing rulings on the subject, and will cause manifest injustice to petitioners and individuals similarly situated. In support they rely upon Chevron Oil Company v. Huson, 404 U.S. 97 (1971).

In Chevron, the Court addressed the issue whether respondent's action was time barred and whether state or federal law determined the timeliness of the action. The Chevron court articulated the necessary prerequisites for retroactive application of a decision. The threshold question must always involve an analysis of the

decision, to determine whether it establishes a new principle of law, by overruling relied-upon "clear past precedent", or whether it decides an issue of first impression.

Petitioners ignore this mandate by advancing the more emotional argument of reliance when they assert they and other unnamed and unknown claimants have relied on the admiralty ruling in White. In so doing they myopically pass over the defense these respondents have made related to admiralty assertions throughout the entire course of the litigation.

Responding to petitioners' thrust of reliance, respondents submit a short review of the course of these proceedings will reveal the specious nature of their reliance argument.

Petitioners' initial pleadings claimed admiralty and diversity but admiralty was denied at the outset. The first trial was under state law through diversity, and, except for an away from trial proffer to support an admiralty contention, admiralty was never mentioned. On appeal, the Fourth Circuit in White ruled admiralty applicable based upon petitioners' proffer and remanded the case. At the second trial respondents sought, but were denied, an evidential hearing on whether plaintiffs' proffer could meet the evidentiary burden necessary to invoke admiralty law. The court ruled that admiralty applied, without further evidence, and tried the case under admiralty principles.

Upon losing, the respondents sought review of the trial court's failure to hold an evidential hearing on the sufficiency of petitioners' evidence for an admiralty invocation. The first argument and briefs in Oman revolved around the admiralty issue: (1) was admiralty proper in the case then under consideration? and (2) was admiralty properly applied, if in fact it did pertain? Before ruling on the first Oman argument, the Fourth Circuit on its own motion, called for a re-examination of its ruling in White as to whether admiralty applied. What followed is the Oman ruling now under appeal. In short, contrary to the assertions and innuendos of petitioners, there has never been one moment in these proceedings where

admiralty has not been challenged by these respondents.

Any detrimental reliance by petitioners was taken with full knowledge of respondents' attack on admiralty at every step in these proceedings. As such, any reliance on the basis of a existing "law of the case" doctrine by petitioners is unsupported, since under White, petitioners succeeded in temporarily securing the application of admiralty, if, and only if, their proffer could withstand the evidential light of day. Petitioners cannot seriously claim it was unforeseeable that the Fourth Circuit would deny admiralty or even reverse its previous holding.

Returning to the threshold question of Chevron, the history of

the case clearly shows the Fourth Circuit did not overrule a relied upon clear past precedent, since admiralty has been under attack from the very moment of the first filings in this case. The clear past precedent petitioners should look to is not White but Executive Jet. One need only to look at the continuing symmetry in the asbestos admiralty cases from Executive Jet forward to detect the clear and unmistakable prevailing rule that admiralty does not apply under nexus considerations to the asbestos product injury claims of land-based ship repair insulators.

A second rationale of Chevron requires the analysis of the prior history of the issue, its purpose and effect, and whether retrospective

application will further or retard its operation. The history of consideration of admiralty as a jurisdictional and legal base for asbestos insulators working in shipyards is of recent vintage. Yet, in each jurisdiction, excepting the Fourth Circuit, as the issue was first considered, admiralty was proscribed. It was not until five sister circuits excluded admiralty and refused to follow White, that the Fourth Circuit reconsidered its error. In realigning its view with its sister circuits, the Fourth Circuit provided consonance instead of dissonance, by correcting its mistaken presumption that admiralty was somehow available to land-based insulators under certain circumstances. Ironically, and contrary to petitioners'

misplaced reliance, the Fourth Circuit did not mandate admiralty without more, but permitted it, only if plaintiffs' proof met the hope of its proffer. Oman does not take away all jurisdictional bases from petitioners; it merely denies the use of admiralty.

The final thrust of Chevron is the need to review a balancing of the equities and the injustice and hardship to both sides in a retroactive application of a decision. Oman does not deny a cause of action to petitioners but insists their claims be processed under state and not admiralty law. Oman simply states that admiralty should never have applied to petitioners' cases. Contraposed to petitioners' argument to admiralty is that the allowance of admiralty in

these four cases will create an artificial island of law in a sea of national uniformity. As a result, the rights of the petitioners will have been preferred over the rights of numerous other plaintiffs and defendants across this country and will render a result inexplicable at law.

Petitioners claim the Fourth Circuit's vacillation on the jurisdictional issue has forced them to undergo the "expense and inconvenience" of a second trial. Yet, petitioners must be reminded their first case under state law resulted in judgments n.o.v. in favor of respondents. Without an appeal and the second trial sought by petitioners, their claims would have then ended. To suggest inequities from an expense

viewpoint asks this Court to ignore the rights of the respondents who have fought admiralty from the beginning of these cases, and who now believe the correct law has been finally defined for these cases.

The traditional general rule favors retroactive application to an overruling decision. Fleming v. Fleming 264 U.S. 29 (1924). And, an overruling decision is generally retrospectively applied absent sufficient compelling reasons to the contrary. When such a reason exists, it is still within the discretion of the court to extend an overruling decision retroactively or to limit it prospectively. Absent a showing of abuse of such discretion, the retroactive application, if in fact there was

such, should not be overturned. Petitioners suggest the events in this case constitute a retroactive application of law, yet the contrary is the case. Labeling an act from a subjective viewpoint does not necessarily make it a fact, such as calling a lion a leopard.

In summary, Chevron dictates retroactivity unless injustice or reliance yields a discretionary alternative to the court. With admiralty under attack from the outset neither injustice nor reliance is present.

## CONCLUSION

Petitioners have the burden of proof in establishing that this Court

should review their case on certiorari. Petitioners have failed to sustain the burden; accordingly, respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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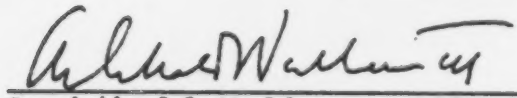

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